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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Joint written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status, Lawyers' Rights Watch Canada, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Restoring the Space for Dissent in Canada

I. Recommendations

Lawyers' Rights Watch Canada (LRWC) and the Asian Legal Resource Centre (ALRC)[1] call on the Human Rights Council to continue to promote and protect the rule of law and human rights in Canada by monitoring the following issues and recommending the:

1. Repeal of national security laws that threaten dissent and advocacy.
2. Establishment of oversight mechanisms to ensure accountability of intelligence and security agencies.
3. An immediate end to "political activities audits" by the Canada Revenue Agency (CRA) of progressive charitable organizations.
4. Creation and maintenance of an enabling environment for civil society organizations (CSOs) and human rights defenders, including the restoration of appropriate funding and consultation mechanisms for CSOs, including for Indigenous organizations.

II. Background

The capacity of CSOs to engage in advocacy and dissent depends on a complex interplay of regulatory, political, and social factors. The concept of an "enabling environment" has emerged to define the scope of these factors; it goes beyond restrictions that prevent groups from existing, functioning and growing, and extends to conditions and positive measures that actively help civil society to function and thrive.[2] Between 2006 and 2015, the Government of Canada, under the leadership of the Conservative Party of Canada, developed and implemented policies and practices that created a punitive, threatening environment for dissent and for advocates. These policies and practices suppressed, harassed and intimidated human rights defenders, public science (including social science), and CSOs, as has been extensively documented by human rights groups, academics, activists and think tanks.[3] Mr. Maina Kiai, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, also expressed concern about widespread reports from CSOs in Canada regarding legal, political, economic and regulatory restrictions.[4]

In October 2015, a majority Liberal government was elected in Canada. LRWC and the ALRC applaud the commitment and transparency of the current Government of Canada (Canada) in taking the unprecedented step

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[1] Governments throughout Asia have introduced similarly punitive and repressive measures to silence individuals and organizations engaged in dissent, human rights advocacy and efforts to participate in government. The ALRC applauds the promised actions to increase space for dissent and human rights advocacy in Canada and joins LRWC in calling on the Human Rights Council to ensure that all states take effective measures to enable the full exercise of internationally protected civil and political rights and to hold states accountable for failures to do so.

[2] CIVICUS. *State of Civil Society 2013: Creating an Enabling Environment.* <http://socs.civicus.org/>.

[3] Amnesty International, *Report 2014/15: State of the World's Human Rights,* Report, London: Amnesty International, 2015, 98; Amnesty International, *Time for Consistent Action - Amnesty International's Human Rights Agenda for Canada* (December 2013). <http://www.amnesty.ca/news/news-releases/time-for-consistent-action-amnesty-international%E2%80%99s-human-rights-agenda-for-canada> at 11-12; Maude Barlow, *Broken Covenant: How Stephen Harper Set out to Silent Dissent and Curtail Democratic Participation in Canada*, Report, Ottawa: Council of Canadians, 2015, <http://canadians.org/sites/default/files/publications/report-broken-covenant.pdf>; Healy and Trew (eds), *The Harper Record 2008-2015* (Ottawa: Canadian Centre for Policy Alternatives, 2015, In Press), <https://www.policyalternatives.ca/publications/reports/harper-record-2008-2015> [Healy and Trew]; Human Rights Watch, *World Report 2014*: Canada, Report, <http://www. hrw.org/world-report/2014/country-chapters/canada?page=1>; Voices-Voix, *Dismantling Democracy: Stifling Debate and Dissent in Canada*. Report. June 2015. Accessed February 7, 2015. <http://voices-voix.ca/sites/voices-voix.ca/files/dismantlingdemocracy_voicesvoix.pdf>.

[4] Interview with Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association (McGill University, October 23, 2013), <http://www.youtube.com/watch?v=FpoaQI5U9Gs>

of transforming its campaign promises into the commitments of Ministerial mandate letters.[5] LRWC and the ALRC further acknowledge and applaud the concrete steps taken by Canada in achieving or undertaking steps to realize approximately forty of the 200+ commitments in the first 100 days in office.

Despite these positive steps, LRWC and the ALRC are concerned that key areas identified as threats to human rights, including legal rights and freedoms of expression, association and peaceful assembly, remain in place or have been only partially addressed, thus perpetuating the chill on dissent in Canada.

- Canada committed to modify rather than repeal Bill C-51 and to "introduce new legislation that strengthens accountability". Bill C-51 (*Antiterrorism Act, 2015*[6]) thus remains in force, and there is still no effective, robust accountability or oversight mechanism, including one that would monitor and address the negative impacts of national security on human rights.[7]
- Canada terminated the "special" CRA program that had harassed progressive charities from about 2012-2015, but 24 of the 'political activities' audits are ongoing and will be completed.[8] Further, while LRWC and the ALRC acknowledge the commitment to update relevant legislative provisions, CRA guidelines still prohibit most advocacy through arbitrary and punitive limits on advocacy activities, which are characterized as "political activities" (which are distinct from partisan activities that are legitimately prohibited).
- Canada has announced that it will re-establish the Court Challenges Program, a special fund for challenging discriminatory laws and policies. However, more than 60 of Canada's leading CSOs working in human rights, environmental protection, women's issues and migrant issues were "defunded" by the previous government.[9] Equitable funding formulas for services to Indigenous peoples continue to be denied in many areas, including services for First Nations children in care.[10] Most of these decisions have not been yet reversed.

III. International Standards

Monitoring, surveillance, and information sharing under national security laws create a chilling effect for groups and individuals who wish to participate peacefully in public processes. Such activities also interfere with privacy. The rights to privacy, freedom of expression, opinion, association, and peaceful assembly are protected by the *International Covenant on Civil and Political Rights*, notably Articles 17, 18, 19, 21, and 22.

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[5] Government of Canada website <http://pm.gc.ca/eng/ministerial-mandate-letters>.

[6] S.C. 2001, c. 41.

[7] A comprehensive analysis of the constitutional, human rights and operational concerns regarding Bill C-51, including erosion of freedom of expression, the broad prohibition on "activities that undermine the security of Canada", and provisions on information sharing have been prepared by Canada's leading experts on antiterrorism, in *Bridging the National Security Accountability Gap: A Three-Part System to Modernize Canada's Inadequate Review of National Security*, Professors Kent Roach (University of Toronto) and Craig Forcese (University of Ottawa) 11 January 2016 and *Canada's Proposed Antiterrorism Act: An Assessment* <http://antiterrorlaw.ca/>. On human rights accountability, see Eliadis, Pearl, *National Security and Human Rights*, Report (Ottawa: Canadian Human Rights Commission, 2011). <http://www.chrc-ccdp.ca/eng/content/national-security-and-human-rights>.

[8] CRA, News Release "Minister Lebouthillier announces winding down of the political activities audit program for charities" (Ottawa: Government of Canada, January 20, 2016).

[9] Pearl Eliadis, "Dismantling democracy Stifling debate and dissent for civil society and Indigenous peoples", in Healy and Trew, *supra* note 3.

[10] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada* 2016 CHRT 2. Canada has announced recently that it will not appeal the ruling, but details of the order, including financial compensation and equitable funding mechanisms, have not yet been released as at the time of writing by the Tribunal. The Minister has, however, committed to address care services for First Nations reserves as a result of the CHRT decision.

In May 2012, Mr. Maina Kiai outlined best practices for the rights to freedom of peaceful assembly and of association, including for CSOs.[11] Mr. Kiai noted that the "right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment," including the obligation to ensure that organizations can operate freely, without fear of smear campaigns. He further noted that associations pursuing objectives and employing means in accordance with international human rights law should benefit from international legal protection, stating: "Associations should enjoy, inter alia, the rights to express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights." Finally, he underscored that the ability of associations to access funding and resources is integral and vital to freedom of association.[12]

IV. UN Human Rights Council Mandate

The United Nations Human Rights Council is mandated to promote and protect human rights by, *inter alia*, preventing violations, removing obstacles to enforcement, engaging states in dialogue, and making recommendations for the protection of human rights.[13] The Council should affirm the illegality of monitoring and surveillance activities directed against the peaceful and lawful activities of CSOs and human rights defenders that promote environmental protection, Indigenous Peoples' rights and fundamental rights and freedoms. The Council should encourage Canada to strengthen its practical measures to reinstate an enabling environment for CSOs and human rights defenders, including the cessation of surveillance and intimidation of CSOs and human rights defenders engaged in the lawful exercise of internationally protected rights, the modernization of a framework for regulating charitable activities that allows CSOs and individuals to participate freely in democratic governance, and the re-establishment of legal and policy frameworks that support funding and therefore survival for the non-profit sector.

V. Conclusion

The ability to participate freely and meaningfully in debates on key public policy and political questions engages international human rights obligations such as obligations to ensure freedoms of opinion, expression, peaceful assembly, and association. It further engages with the growing emphasis on the processes and mechanisms that facilitate and enable the exercise of these rights and freedoms, including the duty to negotiate, to consult, to accommodate, and to participate in democratic governance.[14] According to a concurring opinion in a 2001 Supreme Court of Canada decision: "The concept of chilling effect is premised on the idea that individuals anticipating penalties may hesitate before exercising constitutional rights. In a constitutional democracy, not only must fundamental freedoms be protected from state action, they must also be given 'breathing space.' "[15]

Mechanisms that foster this breathing space and the role of civil society to participate in policy debates include the removal of anti-terrorism provisions that threaten to criminalize legitimate dissent, the availability of spaces and platforms for inclusive dialogue with government, meaningful opportunities to influence policy agendas, and normative frameworks that facilitate advocacy, collective organizing, and the ability to fundraise.

Canada is to be applauded for its efforts since the 2015 general election to address many of the issues that are raised in this statement. However, Canada must be held accountable for its commitments and ongoing vigilance is required from CSOs and human rights defenders to promote the development of a framework for an enabling environment.

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[11] Report of Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.27_En.pdf.PDF>.

[12] *Ibid.*

[13] General Assembly Res. A/RES/48/141 20 Dec. 1993, articles 3 (a), (f), (g), and General Assembly Res.A/RES/60/251, 3 Apr. 2006, art. 5(i).

[14] See Colleen Sheppard, "Inclusion, Voice and Process-based Constitutionalism" (2013) 50:3 Osgoode Hall LJ 547.

[15] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para 148, L'Heureux-Dubé J., concurring.